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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

NO. 532

JOLEN HATHAWAY, Appellant

v.

STATE OF TEXAS, Appellee

APPEAL FROM THE COUNTY COURT
OF COOKE COUNTY, TEXAS

JURISDICTIONAL STATEMENT AND APPENDICES

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JURISDICTIONAL STATEMENT

The appellant, Jolen Hathaway, appeals from the order of the County Court of Cooke County, Texas, entered after a trial de novo on August 9, 1962, sentencing him to pay a fine of $25 for violation of the ordinance of the City of Gainesville, Texas, dated June 6, 1961, and submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

A. Opinions of the Courts Below

The opinion of the County Court of Cooke County, Texas, was entered orally at the close of the trial and is not reported. A copy of the judgment of the County Court, filed August 23, 1962, is attached as Appendix A. The Corporation Court of the City of Gainesville, Texas, from which an appeal was taken to the County Court of Cooke County, Texas, found defendant guilty of violating

the ordinance of the City of Gainesville, Texas, dated June 6, 1961, and imposed a sentence of a $25 fine, without opinion.

B. Grounds on Which Jurisdiction Is Invoked

1. This case arose on a complaint filed in the Corporation Court of the City of Gainesville, Texas, charging appellant, Jolen Hathaway, with violation of the ordinance of the City of Gainesville, Texas, dated June 6, 1961. Upon being convicted, an appeal was taken to the County Court of Cooke County, Texas, which heard the case de novo.

2. The oral order sought to be reviewed was entered on August 9, 1962, and judgment was entered on August 23, 1962 (Appendix A). Appellant filed his notice of appeal in the County Court of Cooke County, Texas, on August 23, 1962.

3. The statutory provision which confers on this Court jurisdiction of this appeal is Title 28 U.S.C. § 1257(2).

4. Cases sustaining the jurisdiction of this Court on direct appeal from a Texas county court, where the defendant is fined less than $100 and hence has no further right of appeal in the state courts of Texas, are: *Jamison v. Texas,* 318 U.S. 413; *Largent v. Texas,* 318 U.S. 418; and *Tucker v. Texas,* 326 U.S. 517.

5. The ordinance of the City of Gainesville, Texas, the validity of which is involved, dated June 6, 1961, is entitled: "An ordinance prohibiting solicitors, peddlers, itinerant merchants and itinerant vendors of merchandise from going upon the premises of private residences without an invitation of the owner or occupant thereof:

defining and regulating solicitors, peddlers, itinerant merchants, itinerant vendors of merchandise, and other persons selling or taking orders for goods, wares, merchandise, services, photographs, newspapers, magazines, or subscriptions to newspapers or magazines; establishing the legal hours for the transaction of such business; providing for a license and a license fee; requiring a bond; requiring such persons to register with the city secretary; and providing penalties for the violation of this ordinance, including a fine not less than $10 nor more than $200." The entire ordinance is attached as Appendix B.

C. Questions Presented

The Gainesville ordinance requires all solicitors to pay a flat sum privilege tax of $30 per year and to post a bond in the penal sum of $1,000. In practice, the ordinance is enforced only against nonresidents. The appellant is a nonresident who solicits orders only for the interstate shipment of merchandise. As applied to the appellant:

1. Is the ordinance repugnant to Article I, Section 8, of the United States Constitution because it imposes a flat sum license fee on solicitors of an out-of-state corporation who only solicit orders for subsequent interstate shipment?

2. Is the ordinance repugnant to Article I, Section 8, of the United States Constitution because it requires a bond in the penal sum of $1,000 to accompany an application for a license by solicitors who only solicit orders for the purchase of merchandise to be shipped in interstate commerce from outside the State of Texas?

3. Is the ordinance, as enforced only against nonresident solicitors, repugnant to Article I, Section 8, and to the Fourteenth Amendment, Section 1, of the United States Constitution because (i) it is discriminatory; (ii) it deprives persons of property without due process of law; (iii) it denies to nonresidents equal protection of the laws; and (iv) it abridges the privileges and immunities of nonresidents of Gainesville, Texas?

D. Statement of the Case

The appellant, Jolen Hathaway, a resident of Denton, Texas, is engaged in the business of soliciting orders for the sale of products of Wear-Ever Aluminum, Inc., a Delaware corporation having its principal place of business in New Kensington, Pennsylvania. All orders taken by the appellant are sent to the New Kensington, Pennsylvania, office of Wear-Ever Aluminum, Inc., and if the orders are there accepted by the company the merchandise is shipped by parcel post C.O.D. from the factory at Olean, New York, to the customer in Texas. The appellant never makes delivery of any merchandise.

On April 20, 1962, the appellant was soliciting orders for merchandise, as above set forth, in Gainesville, Texas, without having obtained a license, without having paid the $30 license fee, and without having posted a bond in the penal sum of $1,000. He was arrested and charged with violating the ordinance. At the hearing in the Corporation Court of Gainesville he pleaded not guilty on the ground that the ordinance is unconstitutional. He was convicted and he appealed to the County Court of Cooke County where there was a trial de novo. At this trial, the testimony revealed that the

ordinance was not enforced as to residents of Gainesville, Texas, but only as to nonresidents. The Secretary of the City of Gainesville testified (R. 7):

"Q. . . . Does this (the ordinance) apply only to nonresidents?

A. Yes.

Q. That is, you make no attempt to apply this ordinance to people who live in Gainesville, whom you know?

A. No, that is, if they live here."

At the conclusion of the testimony, the appellant asserted that the ordinance violates the Constitution of the United States in that it is a burden on interstate commerce and deprives the defendant of property without due process of law, and, as enforced, the ordinance deprives the defendant of equal protection of the laws and abridges the privileges and immunities of nonresidents of Gainesville, Texas (Appendix C). The County Court of Cooke County ruled against the appellant on each of these contentions, found him guilty of violating the ordinance, and imposed a fine of $25.

E. The Questions Are Substantial

1. As to the power of Gainesville to impose a flat sum privilege tax on a person engaged in the solicitation of orders for interstate shipment, the issue is squarely ruled by *West Point Wholesale Grocery Co. v. City of Opelika*, 354 U.S. 390; *Memphis Steam Laundry Cleaner, Inc. v. Stone*, 342 U.S. 389, and *Nippert v. City of Richmond*, 327 U.S. 416.

In *West Point Wholesale Grocery Co. v. City of Opelika*, 354 U.S. 390, this Court held (p. 391):

"We held in *Nippert v. City of Richmond*, 327 U.S. 416, and in *Memphis Steam Laundry Cleaner, Inc. v. Stone*, 342 U.S. 389, that a municipality may not impose a flat-sum privilege tax on an interstate enterprise whose only contact with the municipality is the solicitation of orders and the subsequent delivery of goods at the end of an uninterrupted movement in interstate commerce, such a tax having a substantial exclusory effect on interstate commerce. In our opinion the tax here in question falls squarely within the ban of those cases."

Memphis Steam Laundry Cleaner, Inc. v. Stone, 342 U.S. 389, held invalid a state-wide privilege tax on transient vendors soliciting business for any laundry not licensed in the State. This Court ruled (pp. 392-393):

"In the long line of 'drummer' cases, beginning with *Robbins v. Shelby County Taxing District*, 120 U.S. 489 (1887), this Court has held that a tax imposed upon the solicitation of interstate business is a tax upon interstate commerce itself. Whether or not solicitation of interstate business may be regarded as a local incident of interstate commerce, the Court has not permitted state taxation to carve out this incident from the integral economic process of interstate commerce."

Nippert v. City of Richmond, 327 U.S. 416, held to the same effect, pointing out the reason why a flat sum license fee is actually a discrimination against interstate commerce (p. 427);

"The tax thus inherently bore no relation to the volume of business done or of returns from it."

When the flat sum license tax is a municipal tax, as it is here, its exclusionary effects upon interstate commerce are multiplied. Potentially, the burden of such a tax could be multiplied by the number of municipalities within the United States and could effectively stop all interstate commerce. In the *Nippert* case, this Court stated (p. 429):

> "The potential excluding effects . . . are magnified many times by recalling that the tax is a municipal tax, not one imposed by the state legislature for uniform operation throughout the State."

2. As to the power of Gainesville to require a $1,000 bond from a person engaged in the solicitation of orders for interstate shipment, the issue is squarely ruled by *Real Silk Hosiery Mills v. City of Portland,* 268 U.S. 325. This case involved an ordinance requiring a bond of $500 conditioned on the delivery of the ordered goods, and this Court disposed of the issue summarily by holding (p. 336):

> "Nor can we accept the theory that an expressed purpose to prevent possible frauds is enough to justify legislation which really interferes with the free flow of legitimate interstate commerce."

This case was recently approved in *Breard v. Alexandria,* 341 U.S. 622, where this Court said (p. 633) that the above-quoted statement " . . . should be read as a comment on an ordinance requiring a license and a bond to carry on interstate business."

The advance payment of a $30 privilege tax and the posting of a $1,000 bond, exacted before the solicitor can determine whether he can obtain enough business in Gainesville to justify entering into the market, effec-

tively stops interstate commerce and deprives the solicitor of his right to do business in Gainesville. "Interstate commerce can hardly survive in so hostile an atmosphere." *Best & Company, Inc. v. Maxwell,* 311 U.S. 454, 456.

3. As to the power of Gainesville to require a $30 privilege tax and a $1,000 bond only from nonresidents, such discrimination against interstate commerce is forbidden by *West Point Wholesale Grocery Co. v. City of Opelika,* 354 U.S. 390. There the ordinance provided different tax rates for local merchants from that imposed on other merchants. This Court held (p. 392):

> "The Commerce Clause forbids any such discrimination against the free flow of trade over state boundaries."

To like effect is *Best & Company, Inc. v. Maxwell,* 311 U.S. 454, 456-457:

> "Nominally the statute taxes all . . . , regardless of whether they are residents or non-residents . . .
>
> "The freedom of commerce which allows the merchants of each state a regional or national market for their goods is not to be fettered by legislation, the actual effect of which is to discriminate in favor of intrastate business, whatever may be the ostensible reach of the language."

Nor can Gainesville contend since it could have prohibited door-to-door solicitation without an invitation (*Breard v. Alexandria,* 341 U.S. 622), that therefore it may tax non-residents for the privilege. Such a claim would be refuted by *Breard v. Alexandria* itself, which upheld "regulation that leaves out-of-state sellers on the

same basis as local sellers", and reiterated that "taxation that threatens interstate commerce with prohibition or discrimination is bad": 341 U.S. at p. 638.

Further, a discrimination in taxes against a nonresident violates the Fourteenth Amendment, both as to due process and as to equal protection. As ruled in *Bethlehem Motors Corp. v. Flynt,* 256 U.S. 421, 426:

> "The condition can be satisfied by a resident manufacturer . . . ; it cannot be satisfied by a nonresident manufacturer . . . Therefore, there is a real discrimination, and an offense against the Fourteenth Amendment . . . "

And *Wheeling Steel Corp. v. Glander,* 337 U.S. 562, 572, ruled:

> " . . . we have held, as to taxation of intangibles, that the federal right of a nonresident 'is the right to equal treatment.' "

Certainly Gainesville has no right to assume that only Gainesville residents are honest and that, therefore, only strangers need post a $1,000 bond.

The equal protection clause forbids intentional and arbitrary discrimination, "whether occasioned by express terms of a statute or by its improper execution through duly constituted agents": *Sunday Lake Iron Co. v. Township of Wakefield,* 247 U.S. 350, 352. And certainly this is so when the law enforcement authorities of Gainesville have not suggested the faintest justification for the discrimination they practice. *Yick Wo v. Hopkins,* 118 U.S. 356, 373, 374, held:

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and ad-

ministered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

Finally, this discrimination against nonresidents is so burdensome, and without any conceivable cause for it, as to deny them the privileges and immunities guaranteed by the Constitution. The case is like *Toomer v. Witsell*, 334 U.S. 385, where the Court, invalidating a statute requiring higher license fees of a nonresident, held (pp. 396, 397):

> "By that statute South Carolina plainly and frankly discriminates against non-residents, and the record leaves little doubt but what the discrimination is so great that its practical effect is virtually exclusionary."

Conclusion

The decisions below sustaining the validity of the ordinance should not be permitted to stand in open defiance of the many existing pronouncements of this Court. The questions raised in this appeal are vital to the hundreds of thousands of persons who solicit orders in interstate commerce. If every municipality in the United States could enact an ordinance requiring a $30 privilege tax and a $1,000 bond, and could enforce the ordinance only against nonresidents, the simple truth is that interstate commerce would go out of existence and business could be transacted only by and among the residents of each community. Accordingly, appellant respectfully submits that the questions presented in this appeal are so substantial as to require full consideration.

Respectfully submitted,

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APPENDIX A

Judgment of the County Court of Cooke County, Texas

Filed August 23, 1962.

This the 9th day of August, 1962, this cause was called for trial and both parties appeared and announced ready for trial, and the defendant Jolen Hathaway pleaded not guilty to the complaint and waived a trial by jury, and submitted the decision of the cause to the Court. And the Court having heard the complaint read, and the defendant's plea of not guilty thereto and the evidence adduced, finds and adjudges that the defendant is guilty of the offense charged in the complaint, and here now fixes his punishment at a fine of $25.00 which he is ordered to pay into the registry of this Court.

The Court further finds and adjudges that the ordinance of the City of Gainesville, Texas, under which the defendant is charged herein, is constitutional and valid.

Whereupon, the defendant gave notice of appeal to the Supreme Court of the United States and the Court hereby stays execution of this judgment pending appeal and fixes supersedeas bond at the sum of $100.00.

SHELBY FLETCHER
Judge, County Court,
Cooke County, Texas

APPENDIX B

Ordinance of the City of Gainesville, dated June 6, 1961.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF GAINESVILLE, TEXAS:

Section 1. This entire ordinance is and shall be deemed in exercise of the police power of the State of Texas, and of the City of Gainesville, for the public safety, comfort, convenience and protection of the city and citizens of said City, and all of the provisions hereof shall be construed for the accomplishment of that purpose.

Section 2. That it shall hereafter be unlawful for any person to go in and upon the premises of a private residence in the City of Gainesville unless requested or invited to do so by the owner or occupant of said private resident for the purpose of soliciting, selling or taking orders for or offering to sell or take orders for any goods, wares, merchandise, services, photographs, newspapers, magazines, or subscriptions to newspapers or magazines.

Section 3. That it shall hereafter be unlawful for any person to go from house to house or from place to place in the City of Gainesville, Texas, soliciting, selling, or taking orders for or offering to sell or take orders for any goods, wares, merchandise, services, photographs, magazines, newspapers or subscriptions to newspapers or magazines except during the hours from 8:00 a.m. until 30 minutes after sundown.

Section 4. That it shall hereafter be unlawful for any person to go from house to house or from place to place in the City of Gainesville, Texas, soliciting, selling

or taking orders for or offering to sell or take orders for any goods, wares, merchandise, services, photographs, newspapers, magazines, or subscriptions to newspapers or magazines, without having first applied for and obtained a license so to do from the City Secretary of said City. It shall also hereafter be unlawful to sell or solicit in said City, as aforesaid, without carrying such license while engaged in such soliciting or selling.

Section 5. That any person desiring to go from house to house or from place to place in the City of Gainesville, Texas, to sell or solicit orders for goods, wares, merchandise, services, photographs, newspapers, magazines or subscriptions to newspapers or magazines, shall make written application to the City Secretary of said City for a license so to do, which application shall show the name and address of applicant, the name and address of the person, firm, or corporation, if any, that he or she represents, and the kind of goods offered for sale, and whether such applicant upon any such sale or order shall demand accept or receive payment or deposit of money in advance of final delivery, and the period of time such applicant wishes to sell or solicit in said City.

Section 6. The application mentioned in Section 5 hereof shall be accompanied by a bond in the penal sum of $1,000.00 signed by applicant and signed, as surety, by some surety company authorized to do business in the State of Texas, conditioned for the final delivery of goods, wares, merchandise, services, photographs, magazines and newspapers in accordance with the terms of any order obtained prior to delivery and also conditioned to indemnify any and all purchases or customers for any and all defects in material or workmanship that may

exist in the articles sold by the principal of said bond, at the time of delivery, and that may be discovered by such purchaser or customer within 30 days after delivery, and which bond shall be for the use and benefit of all persons, firms or corporations that may make any purchase or give any order to the principal on said bond, or to any agent or employee of the principal.

Provided that in case applicant is a person, firm, company, partnership, corporation or association engaging in any activity mentioned in Section 2 hereof through one or more agents or employees, such persons, firm, company, partnership, corporation or association shall be required to enter into only one bond, in the sum of $1,000.00 as above required, which bond shall be made to cover the activities of all its agents or employees.

Section 7. That a solicitor, a peddler, an itinerant merchant or an itinerant vendor as the terms are used in this ordinance shall be held to be any person, firm company, partnership, corporation or association engaged in any activity mentioned in Section 2 hereof.

Section 8. That the license fee for a solicitor, a peddler, an itinerant merchant or an itinerant vendor shall be $30.00. Provided, however, when any person, firm, company, partnership, corporation or association engaged in any activity mentioned in Section 2 hereof through one or more agents or employees, such person, firm, company, partnership, corporation or association shall, in addition to said $30.00 fee above mentioned, pay a license fee of $10.00 for each agent or employee so engaged, all of which licenses shall be valid for one year from the date of their issuance; provided, further, that

the license shall be issued to the individual agent or employee and shall not be used by any other agent or employee.

The fees herein provided for shall be used for the purpose of defraying expenses incident to the issuing of said licenses.

Section 9. The provisions of this ordinance shall not apply to sales made to dealers by commercial travelers or sales agents in the usual course of business, nor to sales made under authority and by order of law, nor to vendors of farm and dairy products.

Section 10. The provisions of this ordinance shall apply to all persons engaged in any activity mentioned in Section 2 hereof. It shall be unlawful for any person or persons to go from house to house or place to place in the City of Gainesville engaged in any activity as mentioned in Section 2 hereof without having first registered with the City Secretary of said City giving the following information.

(a) Name, home address and local address, if any, of registrant.

(b) Name and address of the person, firm or corporation, if any, that he or she represents or for whom or through whom orders are to be solicited or cleared.

(c) Nature of the articles or things which are to be sold or for which orders are to be solicited.

(d) Whether registrant, upon any sale or order shall demand or receive or accept payment or deposit of money in advance of final delivery.

(e) Period of time which registrant wishes to solicit or sell in said city.

The registrant at the time of the registration, as herein provided for, shall submit for inspection of the City Secretary written proof of his identity which may be in the form of an automobile operator's license, identification letter or card issued to registrant by the persons, firm or corporation for whom or through whom orders are to be solicited or cleared.

Section 11. Any person, firm or corporation violating any provisions of this ordinance or failing to observe any provisions hereof shall be deemed guilty of a misdemeanor and upon conviction shall be fined in any sum not less than $10.00 and not more than $200.00 and each and every day or fraction of a day during which this ordinance, or any part thereof, shall be violated, shall be deemed a separate offense and punishable as such.

Section 12. Each and every provision, paragraph, sentence and clause of this ordinance has been separately considered and passed by the City Council, and each provision would have been separately passed without any other provision, and if any provision hereof shall be ineffective, invalid or unconstitutional for any cause, it shall not impair, nor affect the remaining portion, nor any other part thereof, but the valid portion shall be enforced just as if it has been passed alone, and all ordinances and parts of ordinances in conflict herewith are hereby repealed.

Section 13. By reason of the fact that the City Council considers the purpose of this ordinance necessary for the public welfare of the City of Gainesville, Texas,

and of its citizens, it is hereby declared to be an emergency measure, demanding that the rule referring ordinance to be read at three separate meetings of the City Council be suspended and that this ordinance take effect immediately from and after its passage, approval and publication according to law, and it is so ordained.

PASSED AND APPROVED this the 6th day of June, 1961.

/s/ RUSSELL GUFFEY
Mayor

ATTEST:
/s/ LOCKIE OWEN
City Secretary

APPENDIX C

Stipulation of Attorneys

It is agreed by the attorneys for the State of Texas and for the defendant in the above-entitled and numbered cause that after all evidence was heard the defendant presented his position and contention that the ordinance of the City of Gainesville under which defendant is charged violates the Constitution of the United States in that it is a burden on interstate commerce and deprives the defendant of property without due process of law, and as enforced the ordinance discriminates against interstate commerce and deprives defendant of the equal protection of the laws, and also that said ordinance violates the Constitution and laws of Texas in that it exceeds the powers of the City of Gainesville.

It is further agreed that the Honorable Shelby Fletcher, Judge of said Court, immediately thereafter stated his finding that the ordinance is valid and adjudged defendant guilty of the violation thereof.

JIM J. HATCHER
Assistant County Attorney,
Cooke County, Texas and
Attorney for the State of Texas
in the above-entitled and
numbered cause.

RAY WINDER
Attorney for defendant,
JOLEN M. HATHAWAY

APPROVED:
SHELBY FLETCHER
County Judge,
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